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Bernard C. Gavit

Indiana University School of Law - Bloomington

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Recommended Citation

Gavit, Bernard C., "Legal Ethics and the Law Schools" (1932). *Articles by Maurer Faculty*. Paper 1228.
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LEGAL ETHICS AND THE LAW SCHOOLS

What Leaders of Movement for Teaching Professional Ethics in the Law Schools Really Have in Mind Is That These Schools Make Some Intelligent and Wholehearted Attempt to Develop Professional Character—What Can Be Done in This Direction by Such Institutions—Bad Effect of Narrow Point of View of Much Teaching in the Past, Etc.

BY BERNARD C. GAVIT

Professor, Indiana University School of Law

DUE primarily to the insistence of the Section on Legal Education of the American Bar Association there is a growing and compelled interest in the problem of the teaching of Legal Ethics in the Law Schools.

No small part of the apparent lack of interest, opposition and unwillingness to co-operate displayed by most of the schools can be explained by calling attention to the fact that there is an unusual amount of confusion which arises out of the language used in the campaign. "Legal Ethics" usually connotes the subject matter contained in the Canons of Professional Ethics, and may it be said in behalf of the Law Schools that experience has demonstrated that that subject matter is not worth much of the students' and the instructors' time. As has been often pointed out the Canons deal primarily with "Ethics" in a very narrow and restricted sense: they are directed at the problem of professional politeness: they constitute the form of professional conduct and not its substance. It is true, of course, that they also contain some very general cautionary instructions on the subject of Trusts and Agency as applied to the legal profession: subjects on which the ordinary student however has a rather specialized knowledge in any event.

But it is increasingly apparent that the leaders of the movement for the teaching of Legal Ethics have something else in mind. Unfortunately they have employed misleading language. What they really want is not that the law schools devote more time to the teaching of the rules of Professional Ethics, but that they make some intelligent and whole-hearted attempt to develop Professional Character. The thing which concerns the Bar today is not that the new generations of lawyers do not have a familiarity with the rules of professional conduct, but that they fail when put to the test of the temptations and the ideals of the profession. And it is always true that it is not a verbal knowledge or belief which determines conduct, but a will and a character which compel it. The first can be developed to the point of perfection, but without a development of the latter there is nothing but the semblance of permanent accomplishment. The distinction is between the law school graduate who is simply a repository of legal knowledge and one who is actually professionally minded and "characterized."

So far the law schools have for the most part been content to deal exclusively with the scholastic attainments of their students. But the growing in-

sistence by the American Bar Association that the results are frequently undesirable illustrates that the scholastic standard is too narrow, and is often misleading in a fair appraisal of the fitness of the graduate for professional practice. Can the schools do anything about it?

II

If we but appreciate the obvious truth that character is a result rather than a means or an end it is clear that they can. It has, of course, been amply demonstrated that to attempt to develop character by teaching or preaching it produces a minus quantity in results. The problem is one of substance rather than of superficial emotion. And on the whole it may well be admitted that the problem is an extremely difficult one and one upon which varying solutions might well be offered and tried. And, too, no one should be so foolish as to expect to appraise the results on the basis of anything other than experience. No Bar Examination can be devised which will test them.

But to me it seems patent that the Bar Association is justified in demanding that the Law Schools re-examine themselves in the light of this additional purpose and that they must give up the scholastic standard as the only criterion for graduation. They must broaden their purposes to include this result.

If that is done it would follow that there must be a reappraisal of both the form and substance of legal education. Character in an attorney is a complex thing: it is a summation of many desirable qualities and characteristics. But a thorough knowledge of legal rules and legal technique, however large it may seem to bulk when measured by quantity standards, is but one of them. We must not, however, minimize its importance, no matter how much we emphasize the importance of other attributes. But even as to these latter knowing and doing are to begin with somewhat co-existent, and so to start with there must be not only a knowledge of legal rules, but also a knowledge of the function of a lawyer.

We need pay little attention to the function of a lawyer as it affects his own selfish individual ends. His background and his environment will amply take care of that. The thing is summed up in the common expression that "a lawyer must first of all make a living." That, however, must be taken with a ton of salt, for in the final analysis, the real quarrel here is with the ideas embodied actu-

ally and inferentially in the expression. The sole possible valid distinction between a business and a profession is whether the purpose asserted and acted upon is one primarily of making a living, or of doing a work of social consequence from which results a living. If one is in business he is in business for gain, and the fact that some slight or great social service may result from his activities is of no concern to him; he has but to hew to the line, and let the results take care of themselves. But if one is really engaged professionally in a profession, gain is a secondary result and neither a primary purpose or result. If the quotation above be corrected it should read: "A lawyer must last of all make a living." The change is not at all disastrous, for under our present economic set-up the living results more or less inevitably, and sometimes even in some liberal proportions.

In other words a profession is socialized: a business is individualized. A profession sets up ideals of conduct which go beyond the immediate: it attempts to appraise the social consequences of professional conduct; and it is organized for the avowed purpose of improving and enforcing the ideals of the group. Thus it is that one who is defrauded by a lawyer rightly complains to "the Bar," and "the Bar" must continue to accept responsibility for its ideals and its practices. Once it ceases to do that it becomes a business organization and not a professional one.

But one can be justly alarmed at the extent to which the non-professional idea has invaded the Bar. The action of the Section on Legal Education is therefore timely and reasonable. Because certainly it is not necessary to produce any arguments to sustain the validity of the professional ideal as applied to the administration of justice. Its very purpose is a social advantage, and one has only to observe the present business depression to learn what a failure the Bar would be were it to abandon a socialized and professional ideal in favor of a strictly business and individualized point of view. The business of an attorney is truly affected with a public interest in no small degree, and we can always profit by instruction which emphasizes that fact, and all of its consequences. And certainly no one need apologize for insisting upon the maintenance of the highest ideals and purposes for the legal profession. We need give them no metaphysical content, for as a pragmatic proposition it is impossible to operate any enterprise without some rather definite purposes previously determined upon. That they go beyond the immediate and advance into the field of the ideal is after all a practical advantage, at least when one is dealing with an enterprise which is so closely associated with a governmental and social function as is the legal profession.

III

And, of course, the real truth is that regardless of whether or not there has been a conscious purpose on the part of those engaged in legal education to develop professional character, the professional character of law school graduates has inevitably been practically if not wholly determined by their law school experience. Whatever the law school does has a result in the lives and characters of its products. And it is sadly true, as the present movement indicates, that the cheapness, the narrowness,

the metaphysics, the formalism and the bread and butter nature of much law school instruction has produced negative results in professional character.

Once we assume that an attorney owes any duty to the courts and the public generally (in other words that he is a prospective leader in the administration of justice and other governmental functions) a broad and tolerant point of view is a first requirement. It is a serious indictment of the form and substance of legal education that it has been dedicated to the reactionary and conservative maintenance of the *status quo*, rather than to a tolerance of change and proposed changes which is the very genius of democratic government. Whenever you teach a young man that there is a metaphysical content to The Law you have temporarily, at least, incapacitated him from acquiring that tolerant point of view. Metaphysics is an unnecessary handicap to social progress, and the law schools ought to divorce themselves from it.

In the more narrow field of an attorney's representation of his client the same thing is true. The late Dean James P. Hall defined "legal reasoning" as "that ability to analyze complicated facts, to reduce instances to principles, and to temper logic with social experience." Too often the latter requirement is overlooked. Courts are constantly re-framing legal assumptions to conform to the modern viewpoint, and the average losing lawyer regards the result as a startling, illegal innovation—"wrong on principle." He forgets, or probably does not know, that that procedure is a necessary and proper portion of the judicial function. Had he stopped to temper his logic with social experience he could probably have foretold the adverse result and saved his client much time and money. A great many things which were "true" fifty years ago are not "true" today.

But primarily that is not his fault. He has been taught that the previous assumptions and all of their logical inferences were "the law" which could be changed only by an act of the legislature.

The result is simply this, that while it has often been said by high authority that a "lawyer must be conservative, else he is no lawyer," the opposite is the more correct postulate. It is no good trying to insist on anything but a scientific outlook in the field of the law, or in any other of the social sciences. It is increasingly apparent that what we do not "know" about social, political and economic existence almost equals—if it does not exceed—what we do not "know" about the physical universe.

Law school instruction whose form or substance tends to produce a non-tolerant, non-scientific outlook in the character of its product has given to the legal profession a member who is handicapped in the proper discharge of both his private and public obligations. He is a stumbling block and not a creative power in social progress. His character has the wrong, and a disastrous bent.

The law as conceived and taught in the past has a narrowing influence. But a broadening influence can be found. The broader and more tolerant views in any field and individual are the result of more (broader and deeper) knowledge and speculation. Law school training quits too soon. (And undoubtedly, too, it begins too late, and not at the beginning.) It quits when it has prepared a fairly competent workman, and before there is much of

an opportunity to produce a fairly competent professionally-minded attorney. A deeper and broader understanding of law and the functions of Law can come only through competent instruction in the field which is commonly called Jurisprudence. Without it your student operates upon his own narrow assumptions and postulates. His legal philosophy is thus home-made.

When we realize that his own narrow assumptions and postulates are to form the motive and guiding power for his supposedly professional career we perceive that there is here a serious deficiency in his character. He lacks both the professional ideal and the equipment with which to acquire or attain one. It is apparent that if there is to be any course of study required for graduation it is a thorough course in modern Jurisprudence.

It may well be that that calls for an increase in the time allotted to law school education. It is increasingly obvious that although you can develop a fairly competent workman and scholar in three years you cannot also develop a reasonably competent attorney in that time. There is need for ripening, and most of our ills can be attributed to the fact that so far we have been unwilling to give to the project the time necessary for that result.

IV

While much can be said against the narrow point of view from which the substantive law is dishied out to the law school student, more can be said against the system when the adjective or procedural law is concerned. Here for some reason or other it seems particularly true that the product feels himself dammed as a lawyer unless he be reactionary. A proposed change in the substantive law can sometimes escape without arousing the average lawyer to white-heat, but no proposal concerning a modification of the law of procedure can escape that result. In a field where the only possible criterion is a practical one there is the most metaphysical viewpoint in the average lawyer. Certainly something can be done in the teaching of the procedural subjects to produce the pragmatic viewpoint.

And, too, something can be done to improve the uses to which the law of procedure is put in practice. Much of our difficulty in the proper disposition of the trial work of courts arises out of the fact that the lawyer has never been taught that during the pleading stage of the proceedings he is strictly an officer of the court and not an advocate; that all of the rules of procedure are made to be *observed by lawyers* and not broken if one can get away with it. The student mind can undoubtedly be properly disciplined on that subject with very beneficial results.

V

Some suggestions have been made above as to possible remedies. What any given law school ought to undertake is a matter which will have to be left to the individual school. Dean John H. Wigmore described, in an address at the Atlantic City Meeting, what the Northwestern University Law School has been doing. The address will be published in all events in the report of the proceed-

ings of the meeting, so that there is no occasion to do more than call attention to it.

It is reasonably clear that despite the advertised overcrowding of the Bar there will continue to be an increased effort on the part of young men and women to become lawyers. A business career is now less attractive than ever before, and there will for a time at least be a decided drift to the professions as a more desirable prospect. It is all to the good; for it means that the Schools and Bar Examining Boards will have more material than ever from which to choose. It will make possible, too, a training and a choice on the basis of professional character as well as scholastic attainment. Public opinion will support a law school course of four years, and a general raising of scholastic and character requirements. The Bar of this country is faced with its first real opportunity to be a Bar in the best sense of that word, and it is well that both the Bar and Schools immediately emphasize character training as an obvious but necessary means of reaching that end.

Against Unseemly Demonstrations in Court

THE Executive Committee of the Cleveland Bar Association has adopted a resolution condemning demonstrations in court rooms when verdicts favorable to defendants in criminal cases are received. The resolutions, as made public by President Walter L. Flory of the Association, read as follows:

"WHEREAS, The President of The Cleveland Bar Association has called the attention of the Committee on Legal Ethics and of this Committee to the fact that demonstrations of an unseemly character now and then take place in our court rooms upon the returning of the verdict of the jury, especially in criminal cases where a verdict of acquittal is returned; and

"WHEREAS, It is of the highest importance in the administration of justice that proper decorum in the court room be at all times maintained, and that all personal considerations should be subordinated to the view that judges and juries are serving the public and not any particular part thereof;

"RESOLVED, That it is the opinion of this Committee that any acts or demonstrations by any persons involved in the administration of justice which tend to create the impression that either the court or the jury have rendered a personal service, are reprehensible. These acts include thanks publicly rendered by successful litigants to the members of the jury or to the court whose decision has been favorable to them."

The Executive Committee took action on the subject following a report of the Committee on Judiciary and Legal Reform in which such demonstrations were condemned and the Judges of the Court of Common Pleas were asked to adopt a Rule of Court or fixed practice preventing them in future.